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No. 84-768

IN THE

Supreme Court of the United States

October Term, 1984

ALLSTATE INS. COMPANY, ARGONAUT INS. COMPANY, HARLEYSVILLE INS. COMPANY, OHIO CASUALTY GROUP OF INS. COMPANIES, ROYAL INS. COMPANY, SUN COMPANY, INC., TRAVELERS INS. COMPANY and WAUSAU INS. COMPANIES,

Appellants/Objecting Members of Defendant Class,

vs.

RICHARD BAKSALARY, WILLIAM JONES, MORRIS TUCKER, CHARLES SAMUEL, Individually and on behalf of all others similarly situated,

Appellees/Plaintiffs,

and

PAUL J. SMITH, C. JOHN URLING, JR., WILLIAM J. SHEPPARD, GRACE M. SLOAN, THE STATE WORKMEN'S INSURANCE FUND, PENNSYLVANIA MANUFACTURERS ASSOC. INS. COMPANY, AMERICAN MUTUAL LIABILITY INS. COMPANY, THE SCHOOL DISTRICT OF PHILADELPHIA, BITUMINOUS CASUALTY CORP. and all other insurance carriers and/or self-insured employers similarly situated,

Defendants (Appellees).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT

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38 pp

Questions Presented

I. WHERE INTERIM SUSPENSION OF WORKMEN'S COMPENSATION BENEFITS, PENDING FINAL EVIDENTIARY DETERMINATION OF A PETITION FOR TERMINATION, CAN BE EFFECTED ONLY ON THE BASIS OF A PHYSICIAN'S AFFIDAVIT OF FULL RECOVERY FROM THE INJURY, OR A RETURN TO WORK WITH NO LOST EARNINGS, IS THERE NOT ABSENCE OF ANY DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW, NECESSARY TO CONSTITUTE VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II. WHERE INTERIM SUSPENSION OF WORKMEN'S COMPENSATION BENEFITS, PENDING FINAL EVIDENTIARY DETERMINATION OF A PETITION FOR TERMINATION, IS EFFECTED BY PRIVATE PERSONS, OR OTHERS ACTING IN SIMILAR CAPACITY, AND OFFICIALS OF THE STATE ONLY ADMINISTRATIVELY PROCESS THE PETITION FOR ASSIGNMENT TO A HEARING REFEREE, IS THERE NOT ABSENCE OF STATE ACTION NECESSARY TO CONSTITUTE VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

List of Parties

Plaintiffs:

Richard Baksalary, William Jones, Morris Tucker and Charles Samuel, individually and on behalf of all others similarly situated

Defendants:

Paul J. Smith (Secretary, Pa. Dept. Labor & Industry); C. John Urling, Jr., (Director, Pa. Workmen's Compensation Bureau); Grace M. Sloan (Treasurer, Commonwealth of Pa.); William J. Sheppard (Pa. Insurance Commissioner)

State Workmen's Insurance Fund, Pennsylvania Manufacturers Association Ins. Company, American Mutual Liability Ins. Company, The School District of Philadelphia, Bituminous Casualty Corp. and all other insurance carriers and/or self-insured employers similarly situated

Intervenor:

Liberty Mutual Insurance Company

Appellants: (Objecting Members of Defendant Class)

Allstate Ins. Company, Argonaut Ins. Company, Harleysville Ins. Company, Ohio Casualty Group of Ins. Companies, Royal Insurance Company, Sun Company, Inc., Travelers Ins. Company and Wausau Ins. Companies

Designation of corporate relationships
Appendix to Jurisdictional Statement 150a

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Opinions Below

The opinion of the three judge court on the merits is reported at 579 F. Supp. 218 (E.D. Pa. 1984), and is printed in the Appendix, pages 36a-83a. The subsequent final order and opinion of July 30, 1984, and the order of August 15, 1984, amending the July 30, 1984 order, are printed in the Appendix, pages 1a-35a.

Jurisdiction

This is a dual class action under Fed. R. Civ. Pro. 23(b)(2), heard by a three judge court convened pursuant to 28 U.S.C. §2281 (now repealed) and §2284, challenging the constitutionality of a supersedeas provision in the termination procedure of the Pennsylvania Workmen's Compensation Act and alleging deprivation of property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, said to entitle plaintiffs to injunctive and declaratory relief under the Civil Rights Act of 1871, 42 U.S.C. §1983 (Supp. V. 1981).

Following a determination of the constitutional merits, the final order of the three judge court approving a consent decree, drawn by the named parties, granting injunctive and declaratory relief, was entered July 31, 1984 (as amended August 13, 1984). The instant appellants, as objecting members of the defendant class, after filing a "protective" appeal to the United States Court of Appeals for the Third Circuit on August 29, 1984, then filed a notice of direct appeal to the United States Supreme Court on September 20, 1984, in the United States District Court for the Eastern District of Pennsylvania.

Direct appeal to this Court, from the three judge court order, is taken pursuant to 28 U.S.C. §1253; and see *White v. Regester*, 412 U.S. 755, 760 (1973), where, upon direct appeal under that section from entry of an injunction, this Court held that appellants were also "entitled to review of the District Court's accompanying declaration."

In response to appellant's petition for a stay of proceedings pending before the circuit court, appellees proposed that appeal by the instant appellants be limited

to a question of the propriety of the district court's approval of the consent decree, excluding any consideration of the constitutional issue on the merits, thereby precluding direct appeal to this Court. To support such a contention, appellees have cited *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928), alluding to language to the effect that a decree rendered by consent "is always affirmed, without considering the merits of the cause." The situation in *Swift*, and thus the context in which the phrase was uttered as a general proposition, however, was that of *consenting* class members seeking to vacate a decree they themselves had previously agreed to, by a *collateral motion* instead of appeal, four years after they had stipulated to the entry of that decree. This is hardly comparable to the situation here, where *objecting* class members filed an immediate, *direct appeal*, upon entry of the final order.

Indeed, the *Swift* Court noted that "[d]ecrees entered by consent have been reviewed upon appeal . . . where there was a claim of lack of actual consent . . . ." *Id.* at 324. In any event, this Court did in fact consider and respond to each of the eight reasons that were relied upon there as jurisdictional bases to vacate the previously agreed decree. *Id.* at 276 ff. *Swift* thus actually affords support if not direct authority for appeals such as this one on the constitutional merits, which go to the district court's jurisdiction in the first instance.

Nor does this Court's decision in *Heckler v. Edwards*, ___ U.S. ___, 104 S.Ct. 1532 (1984), also relied upon by appellees in the circuit court proceedings, suggest otherwise. In *Heckler*, unconstitutionality of a federal statute was *not* actually in issue, the question having been rendered moot by acquiescence at pretrial. Since the

petitioner there did not defend the constitutional issue, or contest the district court's holding of unconstitutionality, and appealed instead only the "remedy," this Court held that direct appeal (there under 28 U.S.C. §1252) would not lie, and that an appeal was properly taken to the circuit court and should not have been dismissed.

Here, however, the situation is exactly opposite; these appellants, as objecting members of defendant class, specifically preserved their right to question the entire constitutional determination by the lower court, while appearing and objecting at the time of the fairness hearing on the proposed consent decree, which was framed solely by the named parties to implement that constitutional determination. And in fact, appellants have appealed that core constitutional issue.

This then is not an effort at belated or collateral reconsideration of a settlement. Rather, in a case founded upon plaintiff class members' complaint of alleged absence of prior notice and opportunity to be heard, this is an immediate appeal by previously absent defendant class members who entered appearance and objected upon first notification of these proceedings. As yet, they have had no opportunity to be heard on the merits of the constitutional determination which directly and dramatically affects each one of them adversely by a final order providing for individual injunctive prohibition, as well as liability for an apportioned share of plaintiffs' attorney's fee. As such, this direct appeal from a final order of a three judge court granting injunctive relief is necessarily warranted, if not to say required, under the applicable provisions of 28 U.S.C. §1253.

Constitutional and Statutory Provisions

I. U. S. CONSTITUTIONAL PROVISION

Amendment XIV, §1, which states in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

II. STATUTORY PROVISIONS

a) United States Code

1) Direct appeals from decisions of three-judge courts
28 U.S.C. §1253

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

2) Injunction against enforcement of State statute; three-judge court required
28 U.S.C. §2281

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

3) Civil Rights Act of 1871
42 U.S.C. §1983 (Supp. V. 1981)

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

b) Federal Rules

Class actions

Rule 23, which states in relevant part:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of sub-division (a) are satisfied, and in addition: . . .

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ."

c) State Statute

Pennsylvania Workmen's Compensation Act

1) *Prior* §413 Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1952), which stated in relevant part:

"The filing of a petition to terminate or modify a compensation agreement or award as provided in this section shall operate as a supersedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require."

2) *Present* §413(a), Pa. Stat. Ann. tit. 77 §774 (Purdon Supp. 1984) provides in relevant part:

"The filing of a petition to terminate or modify a notice of compensation payable or a compensation agreement or award as provided in this section shall operate as a supersedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require only when such petition alleges that the employee has returned to work at his prior or increased earnings or where the petition alleges that the employee has fully recovered and is accompanied by an affidavit of a physician on a form prescribed by the department to that effect which is based upon an examination made within fifteen days of the filing of the petition."

Statement of the Case

A. Procedural History

Plaintiff-employees brought this action in 1976 against their respective employers and/or workmen's compensation insurance carriers, naming in addition certain officials of the Commonwealth of Pennsylvania (Secretary of Labor & Industry, Treasurer, Insurance Commissioner and Director of Workmen's Compensation Bureau), seeking injunctive and declaratory relief from a supersedeas procedure in Section 413(a) of the Pennsylvania Workmen's Compensation Act. It was contended that this procedure for interim suspension of workmen's compensation benefits, while awaiting a formal evidentiary decision on a petition for termination, constitutes a violation of the due process clause of the Fourteenth Amendment to the United States Constitution, entitling plaintiffs to relief under §1983 of the Civil Rights Act of 1871.

Upon motion by plaintiffs, a three judge court was convened pursuant to 28 U.S.C. §2281 (since repealed) and §2284. Subsequently, again on motion by plaintiffs, an order was entered permitting the case to proceed as a dual class action under Fed. R. Civ. Pro. 23(b)(2); the plaintiff class being all employees who have had, or will have, their workmen's compensation benefits suspended under the supersedeas procedure, and the defendant class being all employers and insurance carriers who have suspended, or will seek to suspend, workmen's compensation benefits under that procedure.

After eight years in litigation, the three judge court filed its opinion on the merits on February 1, 1984, concluding that (Apdx., 72a):

> plaintiffs have made out a violation of 42 U.S.C. §1983 (Supp. V 1981). Plaintiffs are entitled to entry of a judgment declaring the unconstitutionality of the automatic supersedeas provision of section 413.

Baksalary v. Smith, 579 F. Supp. 218, 233 (E.D. Pa. 1984). While the court awaited suggested forms of order from the named parties, for remedial implementation of their decision on the merits, those named parties entered into a proposed consent decree (Apdx., 110a) which, after preliminary approval by the three judge court (Apdx., 131a) was scheduled for a fairness hearing on June 18, 1984.

Upon receiving notice of the proposed consent decree and fairness hearing, certain previously unnamed members of defendant class who had no prior notification of the proceedings, including appellants herein, through counsel, appeared of record, filed objections with regard to issues raised for consideration at the fairness hearing, and specifically preserved their rights to object to the entire constitutional determination (Apdx., 135a, 137a, 144a, 146a).

Following the fairness hearing and presentation of objections and argument at that time, the three judge court entered a final order under date of July 31, 1984 (Apdx., 30a), as amended by the order of August 13, 1984 (Apdx., 34a). The court thereby approved the consent decree and granted injunctive and declaratory relief, proscribing the use of the supersedeas procedure in §413(a) of the Pennsylvania Workmen's Compensation Act.

Appellants initially filed an appeal to the United States Court of Appeals for the Third Circuit on August 29, 1984 (Apdx., 84a) to protect their position should any eventual decision require initial appellate determination by the circuit court. That appeal remains pending; however, a motion for a stay of proceedings to await this Court's determination has now been granted (Apdx., 148a).

B. Factual Background

The Pennsylvania Workmen's Compensation Act provides a schedule of compensation for injuries received by an employee in the course of employment and a procedure for the determination of liability and compensation. Pa. Stat. Ann. tit. 77, §§1-1031 (Purdon Supp. 1984). The arrangement is one between employer and employee whereby, in return for immunity from suit at common law based on "fault," the employer bears the cost, ultimately passed on to the consumer, of work-connected injuries regardless of fault. The required system of insurance assures payment and avoids having the cost of such injuries borne by public funds. *See Silas v. Smith*, 361 F. Supp. 1187, 1188 (E.D. Pa. 1973).

Liability is either accepted under a form of notice of compensation payable or agreement, §407; Pa. Stat. Ann. tit. 77, §731 (Purdon Supp. 1984), or determined by a workmen's compensation referee following a petition filed by the employee with the Workmen's Compensation Bureau. §410; Pa. Stat. Ann. tit. 77, §751 (Purdon Supp. 1984).

Upon agreement or award, the employer and/or his workmen's compensation insurance carrier remains responsible for continued payment of workmen's compensation benefits, unless and until there is some subsequent agreement or award suspending or terminating that obligation. §413(b); Pa. Stat. Ann. tit. 77, §774.1 (Purdon Supp. 1984). Where the parties fail to agree upon the cessation of payment, the Act provides a procedure to effect termination, suspension or modification of any existing agreement or award. Under this procedure, a petition is filed by or on behalf of the

employer with the Workmen's Compensation Bureau, assigned to a referee, and formal hearings ensue until a final evidentiary determination is made as between the contesting parties, employer and employee.

In those proceedings under a petition for termination of compensation payments the burden is strictly and solely upon the employer. *See Page v. W.C.A.B.*, _____ Pa. Commw. _____, 476 A.2d 508, 509 (1984). If the employee ultimately prevails in the pending evidentiary hearings on the petition for termination, following an interim suspension of payment, he is then awarded full retroactive relief, with ten per cent interest. *See Baksalary v. Smith*, 579 F. Supp. 218, 224, 225 (E.D. Pa. 1984). And unless the employer establishes that there was reasonable basis for the petition, the employee is also awarded payment of his attorney's fee. §440; Pa. Stat. Ann. tit. 77, §996 (Purdon Supp. 1984). In addition, the employer may be responsible for payment of penalties to the employee for any violation of statutory requirement or rule. §435; Pa. Stat. Ann. tit. 77, §991 (Purdon Supp. 1984).

In relevant part, *prior* section 413 of the Pennsylvania Workmen's Compensation Act, setting forth the procedure for such petitions to change or terminate benefits, provided:

> The filing of a petition to terminate or modify a compensation agreement or award as provided in this section shall operate as a supersedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require.

§413; Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1952). Effective May 1, 1972, §413 was amended to *present wording*:

> The filing of a petition to terminate or modify a notice of compensation payable or a compensation agreement or award as provided in this section shall operate as a supersedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require *only when such petition alleges that the employee has returned to work at his prior or increased earnings or where the petition alleges that the employee has fully recovered and is accompanied by an affidavit of a physician on a form prescribed by the department to that effect which is based upon an examination made within fifteen days of the filing of the petition.*

§413(a); Pa. Stat. Ann. tit. 77, §774 (Purdon Supp. 1984) (emphasis supplied). The italicized portion of §413(a), added by amendment in 1972, is the subject of the instant litigation. Plaintiffs complain that the supersedeas procedure allowing for an interim suspension of workmen's compensation benefits, though now permitted *only* on the two described bases, while awaiting final evidentiary determination of a formal petition for termination, nevertheless constitutes a violation of the due process clause of the Fourteenth Amendment to the United States Constitution, entitling them to injunctive and declaratory relief under §1983 of the Civil Rights Act of 1871.

Substantiality of Issues

A. Due Process

Appellees-plaintiffs contend that interim suspension of workmen's compensation benefits under §413(a) of the Pennsylvania Workmen's Compensation Act, based either on physician's affidavit of full recovery from injury, or return to work with no lost earnings, while awaiting final evidentiary determination of a pending petition for termination, constitutes a violation of the due process clause of the Fourteenth Amendment to the United States Constitution; and that this entitles them to relief under §1983 of the Civil Rights Act of 1871, by reason of the absence of prior notice and opportunity to be heard.

Initially the question arises whether workmen's compensation benefits are constitutionally protected property; if they are not, then of course there can be no constitutional violation with regard to even an actual "taking." *Board of Regents v. Roth*, 408 U.S. 564 (1972). Unlike the public funds from federal grants in aid, as in *Goldberg v. Kelly*, 397 U.S. 254, 256 n.1 (1970), or revenue derived from employee and employer payroll taxes, as in *Matthews v. Eldridge*, 424 U.S. 319, 323 n. 1 (1976), workmen's compensation benefits are insured payments which the employer is alone responsible for supplying, either through a self-insurance or private insurance program.

In dealing with workmen's compensation benefits, this Court has long recognized that broad latitude is to be given "state economic and social regulation." *See Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972). Nor does Pennsylvania consider entitlement to

workmen's compensation disability benefits "a fundamental right." *See Guess v. W.C.A.B.*, 77 Pa. Commw. 319, 324, 466 A.2d 1098, 1101 (1983).

If there is a protected property right, it surely does not rise to the level of protection that would be applicable either to life-threatening or welfare-requiring situations. Indeed, the issue is always one of "balancing"; "due process is flexible and calls for such procedural protections as a particular situation demands." *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In speaking of the Federal Longshoremen's & Harbor Workers' Compensation Act, and other similar workers' compensation statutes, Justice Marshall recently stated in *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. _____, _____, 104 S.Ct. _____, _____, 81 L.Ed. 2d 768, 775 (1984):

> These statutes reflect a legislated compromise between the interests of employees and the concerns of employers. On both sides, there is a *quid pro quo.* In return for the guarantee of compensation, the employees surrender common-law remedies against their employers for work-related injuries. For the employer, the reward for securing compensation is immunity from employee tort suits.

As was said by this Court in *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. _____, _____, 103 S.Ct. 2045, 2052 (1983), a compensation act is "not a simple remedial statute intended for the benefit of the workers. Rather, it was designed to strike a balance between the concerns of the [employees] on the one hand, and their employers on the other". And while the Pennsylvania Supreme Court has consistently interpreted the Workmen's Compensation Act liberally in favor of employees, they have at the same time

emphasized that "... there is always grave danger of overlooking the fact that the compensation act is what it purports to be—an act to compensate for ... injuries and not one to insure the life and health of the employee." *See Monahan v. Seeds & Durham*, 336 Pa. 67, 74, 6 A.2d 889, 892 (1939).

These basic principles must be kept in mind then when seeking resolution of the issue whether the administrative procedures provided under the Pennsylvania Workmen's Compensation Act are constitutionally sufficient. What is required is an analysis of the interests. *See Matthews v. Eldridge*, 424 U.S. 319, 334 (1976). In making such analysis, it is important to recognize that unlike the welfare recipient in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the workmen's compensation claimant does not receive payment on the basis of "need"; moreover, as the social security disability claimant, in *Matthews v. Eldridge*, 424 U.S. 319 (1976) has alternative sources of financial aid, so too, the workmen's compensation recipient has these, and in addition also has available the very social security disability benefits which were the subject of *Matthews*.

The risk of erroneous deprivation of workmen's compensation benefits is at least subject to a degree of balancing by the risk of erroneous payment by the employer or workmen's compensation insurance carrier. The qualitative balancing must necessarily take into account the importance, if not to say the necessity, of a fair system that not only affords benefits to employees, but also protects against erroneous and unwarranted payment that would otherwise adversely affect both the local economic structure, by driving business in search of more favorable climates, and the very moral structure of the community.

Nor is there here any "governmental interest" peculiar to those other cases where the government is the creator, holder and administrator of the fund; and where, when a question arises as to recipients' entitlement, it is then the government itself that is both the adversary and the arbiter in the proceeding. Such is not the case in connection with workmen's compensation benefits, where the "governmental interest" of the Commonwealth extends essentially to ministerial review and orderly administration of the procedure whereby private parties, employees and employers, effect a system of payments for disability as the result of injury in the course of employment, without regard to fault, in lieu of the prior common law system.

In all, and throughout, the lower court appeared to rely heavily on *Matthews v. Eldridge*, 424 U.S. 319 (1976). What must be kept in mind though is that *only* in *Goldberg v. Kelly*, 397 U.S. 254 (1970), where it was emphasized that those welfare recipients were on the very margin of subsistence, has this Court held that due process requires an evidentiary hearing prior to a temporary deprivation. What is actually held in *Matthews* is that there was "less reason [there] than in *Goldberg* to depart from the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action." *Id.* at 343.

With the instant case then requiring less "process" than *Matthews*, the question posed is whether, aside from the procedures in place, which themselves afford "process," there is some need for, or requirement of, additional process; in short, is additional process "due"?

1) Physician's Affidavit

Where supersedeas is effected on the basis of a physician's affidavit, the employee has had some, if not to say a considerable, degree of "process." Thus he is notified to appear for an examination by a licensed medical practitioner. At the time of examination, he has opportunity to voice and explain complaints, and certainly recognizes from the outset that since Pennsylvania is a "wage loss" state, and he has been receiving workmen's compensation benefits on the basis of disability from a work connected injury that prevented him from returning to work, the examination of necessity is designed to determine medical status, and in particular ability to resume gainful employment.

Before the supersedeas procedure can be utilized, the physician, following examination, must attest in a notarized statement that the claimant has *fully recovered* from injury and is *able to resume pre-injury job duties without limitation.* This, it should be noted, is a much stricter test and requirement than that which would ultimately entitle an employer to termination of compensation benefits in the course of formal hearings that are already in process, where the referee need only find "that the claimant's disability has ceased" so as to permit a return to work. *See Paxson v. W.C.A.B.*, _____ Pa. Commw. _____, _____, 474 A.2d 1233, 1235 (1984).

The physician's affidavit must then be attached to a formal petition for termination and filed with the Workmen's Compensation Bureau by or on behalf of the employer, for purposes of assignment to a Referee, who will then proceed to hold formal hearings directed to a final determination. Such filing is required to be accomplished within just fifteen days after the doctor's

examination, to assure that any interim suspension of payments based on the affidavit is reflective of a current medical evaluation.

Thus in every case the employee is entitled to and necessarily receives—*automatically*—a full evidentiary hearing prior to a final determination by an impartial referee, before whom the employer has the burden of proving entitlement to any stoppage of payment. In the meantime, §422 of the Pennsylvania Workmen's Compensation Act gives the employee access to "complete record of the medical and surgical services and hospital treatment including X rays, laboratory tests, and all other medical and surgical data in the possession or under the control of the [employer]." Pa. Stat. Ann. tit. 77, §835 (Purdon Supp. 1984). The relevant distinction to be kept in mind then, when considering the supersedeas procedure, is that in those cases where prior "notice" was deemed essential, the recipient who was being deprived of benefits, though he generally had some "right" to *seek* formal hearing by request, did *not automatically* receive formal evidentiary determination after the preliminary decision was made to stop payment. *See Matthews v. Eldridge*, 424 U.S. 319, 324 (1976). In a such situation, it may be argued that prior "notice" gives a recipient a more effective opportunity to have "some kind of hearing" *where he might otherwise have none at all*! But under the Pennsylvania Workmen's Compensation Act, the case *automatically* proceeds by way of formal petition to a final evidentiary determination, with the burden of proof on the employer, and there is no similar need for some abstract prior "notice" that does not serve any significantly useful purpose in and of itself.

Presumably the requirement of prior notice, where it exists, is to advise the benefit recipient at a meaningful time of an interruption of benefits so that he may take such counter-action as he may wish in a meaningful manner. These elements must, however, be considered in context. Where, as in both *Goldberg v. Kelly*, 397 U.S. 254 (1970), and *Matthews v. Eldridge*, 424 U.S. 319 (1976), the interruption of payment was by the governmental holders of public funds, themselves chargeable with the final determination of continued entitlement, prior notice may be necessary. Indeed, absence of notice in such situation may actually effectively preclude a recipient from even an *eventual* opportunity for full evidentiary hearing. When this is compared with the Pennsylvania procedure, where the employer-party to the insured program may suspend benefits *only* on one of two restricted bases, while at the same time necessarily initiating an automatic formal petition for termination, which is then processed to a final evidentiary determination, and where that final determination is made not by the party who suspended benefits, but rather by an impartial administrative agency of the Commonwealth, the balance of interests and equities is apparent, and no actual deprivation of property without due process of law exists.

In the context then of the adversary system in effect under the Pennsylvania Workmen's Compensation Act, the employee does indeed have an opportunity to be heard at a meaningful time in a meaningful manner, in the course of a formal "automatic" evidentiary procedure on the petition for termination, under which the interim suspension of compensation benefits was effected, and where the burden of proof is entirely on the employer. *See Page v. W.C.A.B.*, _____ Pa. Commw. _____, 476 A.2d 508, 509 (1984).

2) Return to work with no lost earnings

So emphatically did the district court stress generic requirement of "notice" and "opportunity to make presentation" that they applied, or at least sought to apply, that reasoning to the alternative supersedeas situation where workmen's compensation benefits are suspended, while awaiting final determination on a formal petition for termination, on the basis of an employee having returned to work with no lost earnings.

It is even more apparent than in the physician's affidavit situation that arguments with regard to deprivation of property without due process of law simply do not apply to the "return to work situation." Nothing in *Matthews v. Eldridge*, 424 U.S. 319 (1976), suggests to the contrary, and significantly, in the very case relied upon by the district court, *Auxier v. Woodward State Hospital-School*, 266 N.W.2d 139, 142-143 (Iowa 1978), *cert. denied* 439 U.S. 930 (1979), *the Supreme Court of Iowa specifically excepted from its denial of due process determination those cases, "where the claimant has demonstrated recovery by return to work."* (Emphasis supplied.) In fact, it should also be noted that though the Iowa court did find a due process deprivation in a "disability situation," where there was a discontinuance of further payment without notice and opportunity to submit evidence of documents, there, as in *Matthews*, the summary termination of payment was *not* accompanied by any concurrent "automatic" procedure for final evidentiary determination. In *Auxier*, the employer simply stopped payment because some "report does not indicate that your client has very much permanent partial disability." *Id.* at 140. Such a doctrinaire determination can hardly be considered comparable to the strict interim suspension procedure under the

Pennsylvania Workmen's Compensation Act, not only requiring an affidavit of full recovery or return to work with no lost earnings, but also affording the employee, in every instance, an automatic formal determination based on full evidentiary hearing, where the employer must sustain the burden of proof.

What is to be drawn from *Auxier*, though, is the fact that the extent of process "due" in the workmen's compensation context is properly a local determination, involving the balancing of local factors, economic, sociologic and political. In this regard, it is meaningful to look to the declarations of the Pennsylvania appellate courts; in particular, decisions from the Commonwealth Court, where workmen's compensation cases are regularly heard. Dealing with due process considerations, the court stated in *Henderson v. W.C.A.B.*, 69 Pa. Commw. 613, 617, 452 A.2d 277, 279 (1982), *petition for allowance of appeal denied* (Pa. March 8, 1983):

> We agree . . . that the suspension of an employee's workmen's compensation benefits by a private insurer prior to a hearing does not violate the employee's rights to due process.

Though not determinative, certainly a declaration by the appellate court charged with review in Pennsylvania workmen's compensation cases should be recognized as persuasive authority on the basis of its peculiar understanding and appreciation of the local considerations that play so large a part in the "balancing" inherent in the due process determination.

In dealing with the return to work situation, the need for or purpose of either prior notice or opportunity to make presentation must certainly be even more emphatically questioned. What "notice" should or could

be given to an employee who must already know himself that he has returned to work? And what "meaningful" prior presentation could be made to the contrary, where in fact such return to work with no lost earnings is the basis for the interim suspension of workmen's compensation benefits, while the employer or insurance carrier must nevertheless proceed, even in the return to work situation, with an automatic formal petition that will go to a final evidentiary determination, in the course of which claimant has ample opportunity for any "presentation" he may wish to make?

Most important is the fact that the supersedeas procedure does not aid, enhance or afford any benefit to the employer or workmen's compensation insurance carrier beyond those they already and always had. Indeed, §413(a) now actually *restricts* the employer's ability to undertake suspension of benefits. *See Henderson v. W.C.A.B.*, 69 Pa. Commw. 613, 618, 452 A.2d 272, 279 (1982), *petition for allowance of appeal denied* (Pa. March 8, 1983). When the intent and operation of the Pennsylvania system of workmen's compensation are recognized and understood, it becomes apparent that any suggestion of employer deprivation of employee's property without due process of law, by an interim suspension of benefits based on physician's affidavit of full recovery or return to work with no lost earnings, while awaiting automatic formal determination of a petition for termination following full evidentiary hearings, is inexplicably anomalous in a Commonwealth known for its extreme liberality to the injured employee.

B. State Action

1) The deprivation must be caused by the exercise of some right created by the state.

This is the first area of inquiry raised in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982), the only one of the three cases decided simultaneously by this Court in which the necessary "state action" was found to exist as basis for due process deprivation. In both of the other two cases, *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and *Blum v. Yaretsky*, 457 U.S. 991 (1982), in spite of "involvement" by state authorities this Court found no "state action."

In *Lugar*, a divided Court found the necessary "state action" to exist where, acting upon a prejudgment attachment procedure embodied in state law, a clerk of the state court issued a writ of attachment, which was then executed by the county sheriff. *Id.* at 924. Addressing that issue in *Lugar*, the Court stated: "The procedural scheme created by the statute obviously is the product of state action." *Id.* at 941. But there the prejudgment attachment "scheme" was intended and designed solely to effect a "taking" of property by the very attachment provided for.

The Pennsylvania Workmen's Compensation Act, on the contrary, is an overall substitution of a "No-Fault" administrative system for the prior common law method of claim determination between employee and employer. Section 413(a), as amended to include now what is referred to as the "automatic supersedeas provision," did not create any right or confer any benefit on the employer; instead, it severely limits and restricts the method by which an employer can now suspend benefits on an interim basis while awaiting the automatic final

determination of a formal petition for termination, which is required of the employer, after liability for workmen's compensation benefits has been established and the employee does not voluntarily agree to termination. *See Henderson v. W.C.A.B.*, 69 Pa. Commw. 613, 618, 452 A.2d 277, 279 (1982), *petition for allowance of appeal denied* (Pa. March 8, 1983).

Appellants therefore urge that the instant case is not ruled by the decision in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), and that there is no proper basis for suggesting any broadening of the application of the first aspect set forth therein, which requires that deprivation be caused by the exercise of some state created right.

2) The deprivation must be effected by a state actor.

The second requirement for "state action" delineated by *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982), is that the party charged with deprivation must be a person who may fairly be said to be a "state actor." Referring to the factual situation presented, the Court determined that there was a "private party's joint participation with state officials in the seizure of disputed property [being] sufficient to characterize that party as a 'state actor'." *Id.* at 941. There, however, the actual "actor" was admittedly the "clerk of the state court," who "issued" a writ of attachment which was then executed by the county sheriff. It was this system, then, created by the state, "whereby state officials will attach property on the *ex parte* application of one party," that the Court found to be prohibited "state action." *Id.* at 942.

Similarly, in oft cited cases where this Court considered constitutional requirements in the context of garnishment actions and prejudgment attachments,

when "state action" was found to exist the "action" was clearly, admittedly, and invariably by a state official who actually took or withheld the property. *See North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). On the other hand, in *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978), where a warehouseman sold goods in his possession to satisfy a lien pursuant to a section in the New York Uniform Commercial Code, the Court found "total absence of overt official involvement," which they said "plainly distinguishes this case from the earlier decisions in posing procedural restrictions on creditors' remedies."

As Chief Justice Burger wrote in *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970)), "a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." And speaking through Justice Rehnquist in *Blum v. Yaretsky*, 457 U.S. 991, 1004-1005 (1982), the Court declared: "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the state responsible for those initiatives under the terms of the Fourteenth Amendment."

Thus in those cases where the "state actor" requirement was found to satisfy "state action," there was some overt action by a state official to take or withhold property, but in the workmen's compensation system in Pennsylvania, Commonwealth officials take no overt action whatsoever. Any "state participation" here is merely by way of passive administration, in connection

with the petition for termination form, and does not serve, either itself, or in concert or conspiracy with the employer or its workmen's compensation insurance carrier, to take or withhold any property. *Cf. Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970).

Clearly, the interim suspension of workmen's compensation benefits is effected by the employer or workmen's compensation insurance carrier; it is they, and only they, who can and do effect that interim suspension of benefits. The Commonwealth does nothing but record the suspension of payment as documented in the petition for termination, prepared and filed by employer or workmen's compensation insurance carrier, thereby automatically initiating the procedure which includes formal evidentiary hearings for a final determination. Here, there is not the symbiotic relationship of *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), where "[t]he State ... insinuated itself into a position of interdependence" with an acting party; nor is there a "sufficiently close nexus between the State and the challenged action of the ... entity so that the action of the latter may be fairly treated as that of the State itself" here, any more than in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974).

Of relevance too, is the point made by Justice Brennan, writing separately in *Adickes*, where he said, "when a private party acts alone, more must be shown ... to establish that he acts 'under color of' a state statute or authority than is needed to show that his action constitutes state action." 398 U.S. at 210. And most significant is the very statement by this Court, albeit in a footnote, that *Lugar* does *not* hold that a "private party's mere invocation of state legal procedures

constitutes 'joint participation' or 'conspiracy' with state officials satisfying the §1983 requirement of action under color of law." *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939 n.21 (1982).

Indeed, the Court went on to say in that same footnote that "[t]he holding today . . . is limited to the particular context of prejudgment attachment," *id.*, and so by no supposed analysis or interpretation can *Lugar* be deemed authority for declaring existence of a "state actor" in the case at bar, involving the Pennsylvania workmen's compensation system. As in connection with the first element in *Lugar*, concerning supposed deprivation of rights created by the state, but even more so in analyzing the second element of "state actor," a significant and unwarranted extension of *Lugar* would be required before the theory advanced there could be used as any basis for determining "state action" here.

Though the instant appellants are all private insurance companies and a private employer, the situation is not actually any different when the employer is some department of the Commonwealth or the insurance company is the State Workmen's Insurance Fund. In both cases, it is "action" as an employer and/or as an insurance carrier which effects the interim suspension of workmen's compensation benefits, in the same manner and to the same extent as is the case with all "private" employers and insurance carriers. No greater weight or authority attaches to a suspension by a Commonwealth employer or the "State Fund." There is no mantle of governmental approval either given or implied. Contrary to the decision of the district court, 579 F. Supp. at 229, there is no necessary determination that where a Commonwealth employer or the State Workmen's Insurance Fund effects interim suspension of workmen's

compensation benefits, "the state is the actor." *Accord Polk County v. Dodson*, 454 U.S. 312 (1981). Here, the "cloth[ing] with . . . authority" that troubled Justice Blackmun in dissent, *id.* at 329, is absent.

The "action" taken by Commonwealth personnel, as employer, or State Fund, is not by virtue of their being "state officials," but rather and only because they are in the position of traditional employers and/or insurance carriers. Indeed, it is perhaps significant to note that while plaintiffs named the Commonwealth officials in their complaint, with prayer for both injunctive and declaratory relief, the consent decree drafted by the named parties themselves and approved by the court does not provide for any such relief whatsoever against those officials! (Apdx., 115a, 116a.)

On reflection, it should be recognized that questions of deprivation of constitutionally protected property without due process of law and of state action are necessarily intertwined. Both may, and indeed should, depend on some reasonable "balancing" which, in a workmen's compensation context, involving a system in force in every state, but varying significantly from state to state with regard to both substance and procedure, suggests that great attention should be paid, and perhaps final reliance placed upon, local considerations. For this case to come within the net of constitutional prohibition, then, the Court must reach beyond any interpretation of *Matthews v. Eldridge*, 424 U.S. 319 (1976), on the issue of "due process," and stretch beyond the holding in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982), on the issue of "state action."

This Court can, of course, make such extensions, but surely there is serious question as to whether any sound or compelling reason exists to do so, where the result would be to not only upset an already liberally balanced workmen's compensation system in Pennsylvania, but also to cast a far reaching shadow on the operation of every other system of workmen's compensation administration presently in use throughout the nation, and by the federal government itself.

The questions thus presented, as to whether there is any deprivation of constitutionally protected property, by state action, without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, to warrant relief under §1983 of the Civil Rights Act, have not previously been addressed by this Court in a workmen's compensation context, and in view of national implication and effect, should therefore be reviewed and resolved following submission of briefs and presentation of oral argument.

Conclusion

For the reasons stated, this Court should note probable jurisdiction.

Respectfully submitted,

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Dated: November 14, 1984